

(noting TSCA's general per day penalty provision at 15 U.S.C. § 2615 is analogous to the RCRA per day penalty provision at issue in Harmon); Newell, 8 E.A.D. at 615-16 (citing Lazarus).

Because the Board's precedent is binding in this proceeding, it is not necessary to re-examine the EAB's analysis under the first prong. The EAB precedent is consistent with EPA's longstanding position that TSCA provides for continuing obligations, and therefore violations may be continuing in nature.¹⁷ Finally, Congress' findings and policy statement in TSCA confirm the Board's conclusion that Congress "contemplated the *possibility* of continuing violations of TSCA." Harmon, 7 E.A.D. at 22; Lazarus, 7 E.A.D. at 368; Newell, 8 E.A.D. at 615-16.

The Agency has long viewed TSCA section 8(e) as imposing a continuing reporting obligation. EPA attaches crucial importance to section 8(e)'s duty to report by treating section 8(e) violations as continuing in nature *and* by not placing a cap on the number of years for which a penalty can be assessed for an ongoing TSCA section 8(e) violation. See generally EPA Enforcement Response Policy for Reporting and Recordkeeping Requirements for TSCA Sections 8, 12 and 13 (1999) (TSCA ERP).¹⁸ As stated in the TSCA ERP, "[f]ailure to comply with the TSCA § 8(e) reporting requirements can be the most serious violation of TSCA § 8. These reports alert the Agency to new information which may have a bearing on the Agency's chemical hazard/risk assessment and chemical control efforts. This ERP reflects the seriousness the Agency attaches to violations of TSCA § 8(e) by not placing caps on the penalties assessed for these violations." Id. at 20. The ERP later notes that a violation under TSCA section 8(e) is continuing, stating that for section 8(e), "[t]he harm continues as long as the *violation*

¹⁷ It has been a matter of longstanding policy, since 1980, that certain violations under TSCA are treated as continuing violations. Guidelines for the Assessment of Civil Penalties Under Section 16 of the Toxic Substances Control Act; PCB Penalty Policy, 45 Fed. Reg. 59,770, 59,776 (Sept. 10, 1980).

¹⁸ This policy has been in place for over a decade and, therefore, the regulated community has had sufficient notice that EPA treats section 8(e) violations as continuing in nature; see United States v. Trident Seafoods Corp., 60 F.3d 556 (9th Cir. 1995) (holding that an agency that wishes to have the continuing violations doctrine applied must give regulated parties clear warning of that possibility).

continues.” Id. at 26 (emphasis added). The Agency’s interpretation of TSCA section 8(e) is in keeping with the general language of TSCA and its legislative history and warrants deference.¹⁹

The Agency’s position that TSCA section 8(e) imposes a continuing duty to inform is consistent with Congress’ findings and policy statements in the statute as well as the Act’s legislative history. Specifically, in section 2(a) of TSCA, which contains Congress’ statement of findings, Congress acknowledges that chemicals “are constantly being developed and produced” and exposure to these chemicals continues to occur “each year.” 15 U.S.C. § 2601(a). This language conveys a description of activities that are ongoing, not static and frozen in time, reflecting Congress’ expectation that TSCA is to regulate activity that is continuing in nature. Furthermore, as Congress set forth in section 2(b) of TSCA:

(b) **Policy** It is the policy of the United States that - (1) adequate data should be developed with respect to the effect of chemical substances and mixtures on health and the environment and that the development of such data should be the responsibility of those who manufacture and those who process such chemical substances and mixtures
....

Id. This statement of policy, when read together with the statement of findings in section 2(a), clearly mirrors Congress’ intent to impose *ongoing* obligations upon the chemical industry to develop data about risks associated with the substances they produce as new chemicals are developed or utilized in new processes.

Moreover, TSCA’s legislative history supports the conclusion that Congress contemplated continuing violations of TSCA in that some of the legal obligations created through TSCA are continuing in nature. As described by Senator Magnuson, the lead sponsor of the Senate bill during Senate consideration of the legislation, TSCA was intended to be a

¹⁹ “[I]n civil cases, an agency’s interpretation regarding the continuing nature of requirements may receive deference in a court’s determination of whether to apply the continuing violations doctrine to the statute of limitations.” Lazarus, 7 E.A.D. at 365 (citing United States v. McGoff, 831 F.2d 1071, 1084 n.22 (D.C. Cir. 1987)).

preventative statute²⁰ designed to provide adequate information to EPA to enable the Agency to act quickly to prevent unreasonable risks to human health and the environment from chemicals and mixtures. This establishes an expectation that information continues to flow to the Agency as it is being developed. Senator Hartke, a sponsor of the Senate bill, also stated during Senate consideration of the bill: "It is the goal of this legislation to provide a means of preventing this suffering and death rather than merely reacting to it or treating it medically after the fact."²¹

The overall purpose of TSCA also leads to the conclusion that certain requirements must be continuing in nature. Given that TSCA is considered a remedial statute, courts may look to the purpose of the statute to determine the applicable statute of limitations. Lazarus, 7 E.A.D. at 365 n.82 (citing In re Briggs & Stratton Corp., 1 E.A.D. 653, 662 (EAB 1981)). It is evident from the legislative history that one of the primary purposes of the TSCA section 8(e) reporting requirement was to establish an "early warning system" for potential harms.²² For TSCA section 8(e) to operate effectively as an early warning system it logically must require the *continual* flow of information to the Agency to ensure appropriate protective measures are taken.

The EAB has also considered the general statutory scheme of an Act when determining whether it contemplates continuing violations. Harmon, 7 E.A.D. at 23. The statutory scheme of TSCA depends, in large measure, upon industry to routinely provide information on chemical substances to EPA in a proactive manner. To effectively carry out the intent of TSCA, that is, to prevent unreasonable risks to human health or the environment from chemicals, the only logical

²⁰ 94 CONG. REC. S4397 (daily ed. March 26, 1976) (statement of Sen. Magnuson, Chairman of the Senate Committee on Commerce, the lead sponsor of the Senate bill and Senate manager of the conference committee on TSCA), reprinted in H.COMM. ON INTERSTATE AND FOREIGN COMMERCE, 94TH CONG., LEGISLATIVE HISTORY OF THE TOXIC SUBSTANCES CONTROL ACT 214 (Comm. Print 1976).

²¹ Id. at 216 (statement of Sen. Hartke, a Senate sponsor of TSCA).

²² "[T]he Toxic Substances Control Act, which provides authority for increased testing of chemicals for their cancer-causing effects, can serve as an early warning system to signal potential dangers before products are widely dispersed and irretrievable danger to society has been unleashed." S. REP. NO. 94-698, at 4, reprinted in H.COMM. ON INTERSTATE AND FOREIGN COMMERCE, 94TH CONG., LEGISLATIVE HISTORY OF THE TOXIC SUBSTANCES CONTROL ACT 160 (Comm. Print 1976).

reading of the statute is that the duty to provide information about the potential harms associated with the chemicals must be ongoing. In fact, during enactment of TSCA, there was concern expressed that industry was not routinely sharing information with the Agency, and TSCA was designed, in part, to address those concerns.²³ Given that exposure scenarios, chemical compositions, and even human responses to chemicals are constantly changing and evolving, it would be nonsensical to conclude that TSCA is intended only to collect data based on a single snap-shot in time, particularly given the many variables involved in assessing risk. As it was noted during the enactment of TSCA, "[o]ne of the major problems confronting regulatory agencies is the uncertainties regarding the total exposure of humans or the environment to a chemical substance or mixture [I]t is essential that each agency's standards reflect appreciation of such multiple exposures. The development of a comprehensive data system should help make this possible."²⁴ A meaningful comprehensive data system must be continually updated to reflect new information about the chemical substances, mixtures and potential risks to ensure protection against risk to injury to health or the environment.

b. Under the Harmon test, section 8(e) of TSCA imposes a mandatory and continuing statutory reporting duty.

Having established that TSCA contemplates continuing violations under the first prong of the Harmon test, we turn to the second prong to examine the specific violation at issue in the instant case, TSCA section 8(e). This statutory provision provides:

Any person who manufactures, processes, or distributes in commerce a chemical substance or mixture and who obtains information which reasonably supports the conclusion that such substance or mixture presents a substantial risk of injury to health or

²³ Senator Tunney, a leading participant in the Senate debate preceding TSCA's enactment, stated with respect to the proposed TSCA reporting requirement, "[t]his provision is included due to the fact that, in hearings of the committee on Commerce that I chaired, it was strongly alleged that health information that suggested certain chemicals were dangerous had been suppressed by the industry from both the government and chemical workers." 94 CONG. REC. S4397 (daily ed. March 26, 1976) (statement of Sen. Tunney), reprinted in H.COMM. ON INTERSTATE AND FOREIGN COMMERCE, 94TH CONG., LEGISLATIVE HISTORY OF THE TOXIC SUBSTANCES CONTROL ACT 209 (Comm. Print 1976).

²⁴ H.R. REP. NO. 94-1341, at 48 (1976), reprinted in H.COMM. ON INTERSTATE AND FOREIGN COMMERCE, 94TH CONG., LEGISLATIVE HISTORY OF THE TOXIC SUBSTANCES CONTROL ACT 455 (Comm. Print 1976).